No. 87-1818

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT E. BADHAM, *et al.*,

Appellants,

v.

MARCH FONG EU, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of California

APPELLANTS' BRIEF IN OPPOSITION TO MOTION OF THE ASSEMBLY OF THE STATE OF CALIFORNIA TO DISMISS OR AFFIRM

ROGER ALLAN MOORE*
E. MARK BRADEN
MICHAEL A. HESS
310 First Street, S.E.
Washington, DC 20003
(202) 863-8638

JAMES R. PARRINELLO
MARGUERITE MARY LEONI
LOUISE J. ROSEN-GARCIA
NIELSEN, MERKSAMER, HODGSON, PARRINELLO & MUELLER
650 California Street
San Francisco, CA 94108
(415) 989-6800

*Counsel of Record

Counsel for Appellants

June 23, 1988

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
I. Registration Figures Are Not a Reliable Measure of Partisan Voting Strength in California	3
II. Appellants Allege Numerous Significant Indicia of Discriminatory Effects and Are Not Required to Plead Indicia of Discrimination Identical to Those Relevant to Racial Gerrymandering Cases	5
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	Page
Davis v. *Bandemer*, 478 U.S. 109, 106 S. Ct. 2797 (1986)	*passim*
Gaffney v. *Cummings*, 412 U.S. 735 (1973)	3
Goldstein v. *Cox*, 396 U.S. 471 (1970)	2
Gunn v. *Univ. Comm. to End the War In Viet Nam*, 399 U.S. 383 (1970)	2
Hicks v. *Miranda*, 422 U.S. 332 (1975)	7
Karcher v. *Daggett*, 462 U.S. 725 (1983)	3
Ketchum v. *Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied sub nom. City Council of Chicago* v. *Ketchum*, 471 U.S. 1185 (1985)	6
Major v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983)	6
Reynolds v. *Sims*, 377 U.S. 533 (1964)	3
Schmidt v. *Lessard*, 414 U.S. 473 (1974)	2
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	6
STATUTES	
Fed. R. Civ. P. 65(d)	2
28 U.S.C. sec. 1253	2
Voting Rights Act of 1965, 42 U.S.C. sec. 1973 (b), *as amended by* Voting Rights Act Amendments of 1982	6
OTHER	
Los Angeles Times, Feb. 28, 1987, at 1, col. 3.	5
Los Angeles Times, Feb. 25, 1988, at 29, col. 3.	5
San Fernando Daily News, Nov. 25, 1987, at 10, col. 1.	5
United Press International Regional News, Feb. 1, 1987	5

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INTRODUCTION

In its motion to dismiss or affirm ("Motion"), appellee Assembly of the State of California ("Assembly") makes three principal arguments: that appellants' complaint below alleged no discriminatory effects other than disproportional election results; that the effects alleged did not approach the level of discriminatory effects required in racial discrimination cases; and that the proper measure of proportionality

is congressional seats compared to party registration figures.[1]

These arguments are without merit.[2] The complaint speaks for itself and clearly alleges effects far beyond disproportional election results. *See, e.g.*, Juris. St. at 41a-49a. Other than in connection with the arguments that follow, the Assembly's assertions to the contrary merit no further response. Furthermore, the Assem-

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[1] The Assembly's "Statement of the Case" contains a distorted presentation of facts, and some facts not contained in the record below, which are in no way pertinent to this Court's jurisdiction. Appellants refrain from responding to these references, but emphasize that this silence should not be construed as agreement with these assertions. *See, e.g.* Motion at 3 n.1 and at 4 n.3.

[2] The only purely jurisdictional issue raised in the Assembly's Motion is a footnote suggesting that this appeal is premature. (Motion at 6 n.4). Appellants have already responded to this issue and refer the Court to the authorities supporting jurisdiction cited in their responses of May 16 and 17 to the appellees' motions for extensions, which were denied by Justice O'Connor.

The cases cited by the Assembly add nothing to their previous analysis. *Goldstein* v. *Cox*, 396 U.S. 471 (1970): interlocutory appeal refused, where a three-judge court had denied appellants' motion for summary judgment, which involved no question of preliminary or permanent injunctive relief; *Gunn* v. *Univ. Comm. to End the War in Vietnam*, 399 U.S. 383 (1970): no section 1253 jurisdiction because the three-judge court issued neither an injunction nor an order granting or denying one; *Schmidt* v. *Lessard*, 414 U.S. 473 (1974): jurisdiction present under section 1253, but cause remanded because the order granting the injunction was not specific enough to comply with Fed. R. Civ. P. 65(d). None of these situations is applicable to the instant case. Judge Poole's memorandum opinion and order has disposed of appellants' claims with prejudice, and nothing that Judge Schnacke can say in his dissenting opinion can change the effect of the court's order.

bly's reliance on party registration figures and racial gerrymandering cases is misplaced and does not affect this Court's jurisdiction of the appeal.

ARGUMENT

I. REGISTRATION FIGURES ARE NOT A RELIABLE MEASURE OF PARTISAN VOTING STRENGTH IN CALIFORNIA.

Appellants' allegations of lack of reasonable parity between votes cast and seats won are well rooted in this Court's precedents. This lack of parity is but one of a series of the indicia of unconstitutional gerrymandering which appellants alleged below. In *Davis* v. *Bandemer*, 106 S. Ct. 2797 (1986), Justice White writing for the plurality noted that "a level of parity between votes and representation . . . is hardly an illegitimate extrapolation from our general majoritarian ethic and the objective of fair and adequate representation recognized in *Reynolds* v. *Sims*, 377 U.S. 533 (1964)." *Davis* v. *Bandemer* at 2807, n.9. In *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), this Court approved a statewide districting plan which measured "statewide political strength," not against registration data, but against actual votes cast. 412 U.S. at 738. *See also Karcher* v. *Daggett*, 462 U.S. 725, 754-5 & n.13 (1983) (Stevens, J., concurring).[3]

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[3] Appellants allege lack of parity, between Republican voting strength, and seats, as verified by election results. *See., e.g.*, Complaint, para. 2, 20-23, 26, 27 & 29; Juris. St. at 33a, 41a-51a. The political science community is in considerable agreement that not only are registration figures an incomplete measure of a party's strength within the electorate, it is also possible to measure effectively—and use in redistricting—the base voting strength of a political party, even in the absence of registration information. (Juris. St. at 21 n. 11).

With no support from the district court's opinion, the Assembly asserts that, as a matter of law, party registration figures are the proper measure of base partisan voting strength. (Motion at 22.) The Assembly's position is without support in either the law or reality. The Assembly does not cite any case which holds that registration figures are the measure of partisan voting strength.

More importantly, registration figures are misleading, because, in California at least, such data are unreliable. There is evidence in the record below in which appellee Secretary of State, the named defendant, questions the validity of California's registration data because of the significant "deadwood" on the unpurged registration rolls.[4] Since the hearing on the motion to dismiss below, the Secretary amplified this view in a February 1987 speech. A release from the Secretary's office and widely reported in the California press states:

> Not since 1934 has the Democratic percentage of total registration been as low as it is right now . . . a pitiful 50.84 percent. And, of course, even that number overstates reality because of the deadwood on the rolls . . . deadwood which is there because we Democrats are too embarrassed to remove it by instituting an effective purge

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[4] Because the Assembly had requested the district court to take judicial notice of registration data to create inferences to dispute the allegations of the complaint (Motion p. 23, n.21.), appellants opposed judicial notice and offered evidence of the "deadwood" on the unpurged registration rolls, by which the reliability of California's registration figures is called into question by the Secretary of the State of California herself.

> mechanism. Removing the deadwood would expose us for what we are . . . a minority party.
>
> Make no mistake about it. California is becoming, California has become, a Republican state, and not just at the Presidential level . . . Were it not for reapportionment, Republicans would probably dominate not only the statehouse, but the legislature and the congressional delegation as well.

"Excerpts of Remarks of Secretary of State March Fong Eu before the Democratic State Central Committee, Sacramento, February 1, 1987," Release No. Feb87/S/Dem 2187; *See* "Eu Hurls Sharp Warning at Her Party," United Press International Regional News, Feb. 1, 1987; "'Deadwood' Is Clogging the Figures of San Diego's Actual Eligible Voters," Los Angeles Times, Feb. 28, 1987, p. 1, col. 3; "Democrats Cling to Deadwood in Face of Rising Republican Tide," San Fernando Daily News, Nov. 25, 1987, p.10, col. 1; "Compromise Proposal Would Rid Voter Rolls of 'Deadwood'," Los Angeles Times, Feb. 25, 1988, p. 29, col. 3.

Hence the use of registration data as a measure of partisan voting strength produces a distorted and untenable result.

II. APPELLANTS ALLEGE NUMEROUS SIGNIFICANT INDICIA OF DISCRIMINATORY EFFECTS AND ARE NOT REQUIRED TO PLEAD INDICIA OF DISCRIMINATION IDENTICAL TO THOSE RELEVANT TO RACIAL GERRYMANDERING CASES.

The Assembly admits that this Court in *Davis* v. *Bandemer* used racial gerrymandering cases for *analogous* indicia of partisan discrimination. (Motion p. 16.) *Davis* v. *Bandemer* at 2812-2813. Neither this Court nor common sense would require that the evi-

dence in partisan gerrymandering cases be *identical* to that in racial cases. The Assembly appears to maintain, nonetheless, that indicia found sufficient in the racial gerrymandering cases it cites selectively are the *only* indicia that can meet appellants' pleading burden.

Even though such a showing is not mandated by *Bandemer*, appellants have alleged evidences of discrimination quite analogous to those found in many racial gerrymandering cases, as well as additional indicia sufficient to invoke constitutional protections. Taken together, the alleged indicia would clearly satisfy the "totality of the circumstances" test applied by this Court in the racial context in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). *E.g.*, *Thornburg* v. *Gingles* at 2761: predictability the evidence of *structural* dilution as compared to the loss of an occasional election; *Ketchum* v. *Byrne*, 740 F.2d 1398, 1405 (7th Cir. 1984) *cert. denied sub nom. City Council of Chicago* v. *Ketchum*, 471 U.S. 1185 (1985): district configurations an independent indicium of discriminatory effect; *Major* v. *Treen*, 574 F. Supp. 325, 352 (E.D. La. 1983): "stacking" and "cracking" of voting strength evidence of vote dilution. The test applied in *Gingles* was an effects test, as required by the 1982 amendments to the Voting Rights Act of 1965, 42 U.S.C. sec. 1973(b). If appellants were a racial or religious group and alleged the same combination of intent and persistent and predictable discriminatory effects alleged in the complaint, there would be no doubt that a constitutional claim would survive a motion to dismiss. And so it should here.

CONCLUSION

If this Court's reasoning in *Davis* v. *Bandemer* is to have any practical meaning in the redistricting of the 1990s, Judge Poole's opinion below cannot be allowed to stand.[5] Neither should the Assembly be allowed to augment that opinion with unreliable data. The Assembly's motion to dismiss or affirm should be denied, and probable jurisdiction noted.

Respectfully submitted,

ROGER ALLAN MOORE*
E. MARK BRADEN
MICHAEL A. HESS
310 First Street, S.E.
Washington, DC 20003
(202)863-8638

JAMES R. PARRINELLO
MARGUERITE MARY LEONI
LOUISE J. ROSEN-GARCIA
NIELSEN, MERKSAMER, HODGSON,
PARRINELLO & MUELLER
650 California Street
San Francisco, CA 94108
(415)989-6800

*Counsel of Record *Counsel for Appellants*

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[5] Summary affirmance or dismissal would be an endorsement by this Court of both Judge Poole's reasoning and judgment below. *Hicks* v. *Miranda*, 422 U.S. 332, 344-345 (1975). Thus, Judge Poole's opinion nullifying Justice White's opinion in *Davis* v. *Bandemer* would bind all lower courts "until such time as the Court informs [them] that [they] are not." *Id.*